

facilities leased from ACS.⁵⁶ Moreover, as William Zarakas finds, it would not be economic to extend GCI's fiber network to serve the vast majority of these locations.⁵⁷ Thus, the substantial majority of such locations will continue to be accessible only using UNEs leased from ACS, even as certain residential locations (that are currently accessible only through UNEs) become accessible over GCI's last-mile cable facilities.

As discussed below, GCI is moving as quickly as possible to create its own substitutes for ACS's last-mile facilities.⁵⁸ ACS will nevertheless continue to dominate the market for this critical input to local service even after GCI moves as many of its customers as it can to self-provisioned, full facilities-based service.⁵⁹ For this reason, granting ACS forbearance from unbundling and related pricing obligations with respect to UNE loops would, in all product markets, undermine the competition that has developed in the Anchorage retail market and thereby reverse the substantial progress that has been achieved to date in Anchorage.

⁵⁶ See Exhibit II, attached to Zarakas Decl.

⁵⁷ See Zarakas Decl. ¶¶ 44, 48 and Exhibit IX, attached thereto (showing that of [BEGIN CONFIDENTIAL][END CONFIDENTIAL] off-net GCI medium and large business locations with 8 or more switched voice lines and/or one or more non-switched DS1s, it would be economic to extend GCI's fiber network to serve [BEGIN CONFIDENTIAL][END CONFIDENTIAL], depending on the weighted average cost of capital).

⁵⁸ See generally Borland Decl. ¶¶ 11-17.

⁵⁹ Zarakas Decl. ¶¶ 7, 16.

B. GCI's Cable Telephone Facilities are Nascent and Cannot Serve All Product Markets in Anchorage.

Since GCI identified a workable cable telephony solution, it has moved as quickly as possible to deploy its own facilities to enable it to provide telephone service to Anchorage consumers without relying on ACS facilities.⁶⁰ In just two years, GCI has constructed [BEGIN CONFIDENTIAL][END CONFIDENTIAL] of the new nodes it expects will be necessary to allow GCI to serve most residential and many small business customers passed by GCI's cable plant, and GCI plans to complete this construction (and migrate existing customers to GCI facilities) as quickly as possible.⁶¹ Moreover, and as discussed in greater detail below, GCI continues to pursue technological and other solutions that will enable it to serve more customers over its existing cable plant.

As demonstrated by these efforts, GCI does not require additional incentives to deploy its own facilities. GCI has made this effort because it strongly prefers not to rely on ACS for service.⁶² By self-provisioning, GCI can avoid making payments to its chief competitor and control end-to-end service delivery to GCI's customers.⁶³ This latter benefit is particularly important to GCI, as one of its defining corporate missions is to deliver excellent customer service.⁶⁴ Finally, by self-provisioning GCI removes the ever-

⁶⁰ Declaration of Richard Dowling ¶ 2 ("Dowling Decl."), attached hereto as Exhibit G; Borland Decl. ¶¶ 11-26.

⁶¹ Dowling Decl. ¶ 11; Borland Decl. ¶ 11 & n.4.

⁶² Borland Decl. ¶¶ 4-17.

⁶³ *Id.*

⁶⁴ GCI has learned through years of experience that it cannot rely on ACS to deliver timely and reliable service, and has suffered untold delays and costs as a result. Although GCI has been able to improve ACS's performance through state commission inquiries,

present risk of increased UNE rates or other regulatory action that could undermine GCI's business plans.⁶⁵

There are significant technical and operational limits, however, on GCI's ability to serve customers without access to UNE loops. To understand these limits one must understand (1) the history of GCI's cable telephony deployment and the nature of its existing facilities; (2) the steps GCI must take to offer high-quality voice service over its cable plant; (3) the obstacles to extending GCI facilities to multiple-dwelling units; (4) the absence of GCI cable plant near most businesses; and (5) the technical challenges to providing high-capacity business services over cable plant.

1. GCI's Development of its Cable Telephony Solution

Unlike many other cable providers, GCI was a telecommunications carrier (offering long distance service) long before it became a cable operator.⁶⁶ In 1995, GCI acquired the cable facilities of three different Alaska cable providers, including the Anchorage cable system.⁶⁷ From the start, GCI hoped to use its newly-acquired cable assets to provide voice service, but at that time the necessary technology and equipment had not yet been developed.⁶⁸ With Congress's enactment of the 1996 Act, GCI was able to enter the local telephone market (using a combination of UNE loops and its own

complaints, and persistence, GCI believes that ACS routinely processes its customer's orders with greater speed and higher priority than GCI orders. *Id.* ¶¶ 13-14.

⁶⁵ *Id.* ¶¶ 4-17.

⁶⁶ Dowling Decl. ¶ 3.

⁶⁷ *Id.*

⁶⁸ *Id.* ¶¶ 4-5.

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facilities) as it prepared to offer full facilities-based service by performing upgrades to its cable plant and working to develop a cable telephony solution.⁶⁹

Even after completing initial upgrades necessary to enable GCI's cable plant to carry return signals – a first step to providing voice service – GCI could not deploy cable telephony because suitable standards and technology had not yet been developed.⁷⁰ It was not until the end of 2001 that the cable industry, through CableLabs, developed and issued DOCSIS 2.0 specifications for advanced cable modems that would truly enable reliable, high-quality packetized voice service over cable plant.⁷¹ In parallel, CableLabs developed the Packet Cable standard, which governed the signaling used to support telephony over cable modems.⁷²

It took some time after issuance of these standards for the relevant equipment manufacturers to incorporate them into their products.⁷³ Moreover, because standards can be interpreted differently by different manufacturers, GCI had to conduct interoperability testing among the various pieces of network equipment it planned to use to provision its cable telephony service.⁷⁴ As is expected, the validation process identified new issues that required new solutions.⁷⁵ For example, GCI had to develop its own echo-canceling firmware to deal with an unsatisfactory echo inherent in the new

⁶⁹ S. Rep. No. 104-230, at 148 (1996) (Conf. Rep.).

⁷⁰ Dowling Decl. ¶ 4. As a relatively small MSO, ACS could not drive the market for the necessary technology and equipment. *See id.* ¶ 10; Declaration of Gary Haynes ¶ 23 (“Haynes Decl.”), attached hereto as Exhibit H.

⁷¹ Dowling Decl. ¶ 5.

⁷² *Id.* ¶ 5 & n.2.

⁷³ *Id.* ¶ 5.

⁷⁴ *Id.* ¶ 6.

⁷⁵ *Id.*

technology.⁷⁶ Meanwhile, some prospective vendors went out of business or stopped supporting products GCI had considered deploying.⁷⁷ By the end of 2002, GCI was nonetheless able to begin initial field trials of its cable-based telephony service, including the initial upgrades and node construction to support its commercial launch of service in April 2004.⁷⁸

Because GCI was already providing voice service using UNE loops, GCI could only adopt cable telephony solutions that met or exceeded the quality of GCI's existing service.⁷⁹ In addition, GCI is subject to state regulations requiring eight hours of backup power in the event of a power failure.⁸⁰ Finally, GCI sought a solution that would allow provisioning without requiring customers to be home for indoor installations.⁸¹ Primarily for these reasons, GCI selected network-powered, outdoor-provisioned technology to deliver its cable telephony to customers.⁸²

2. Extending Cable Telephony to Existing Residential Customers

After selecting and validating its cable telephony equipment and technology, GCI began the substantial work necessary to enable GCI's existing cable plant to deliver voice service. This upgrade process requires several steps. Even after the upgrades described

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* ¶ 9.

⁸⁰ *Id.* ¶ 8 (citing 3 AAC § 52.270 (b)).

⁸¹ *Id.* ¶ 9; Haynes Decl. ¶ 4.

⁸² In an effort to further speed its deployment of cable telephony, GCI is currently considering use of a customer-powered, rather than network-powered, network design and CPE. Dowling Decl. ¶ 11. It is not clear, however, whether this approach will work to transition existing customers. *Id.*; see also Haynes Decl. ¶ 4.

below are completed, GCI will be unable to serve customers that are not reached by GCI's cable plant without the use of UNEs.⁸³

Network-Wide Upgrades. The cable telephony plant upgrade process begins at GCI's switch, where GCI must install a host of new equipment, including voice gateways, Cable Modem Termination Systems ("CMTS"), narrowcast lasers, wave division multiplexers, and optical splitters.⁸⁴ Voice gateways are necessary to convert time division multiplexed voice signals from GCI's 5E switch to Internet Protocol ("IP") packet data, which the CMTS modulates onto a Radio Frequency ("RF") carrier.⁸⁵ The RF carrier is then converted to optical signals through the narrowcast lasers, wave division multiplexers, and optical splitters for transport across high capacity fiber optic cable to the optical nodes in the field.⁸⁶ These are not one-time upgrades.⁸⁷ Instead, as GCI expands its DLPS service areas, it must continually add equipment at its switch location to handle the resulting increases in DLPS traffic.⁸⁸

Node Construction and Upgrades. The upgrade process then continues at each GCI node. Existing nodes are "right-sized" to provide voice service.⁸⁹ In other words, to diminish noise created by the addition of a return path and to reduce the number of voice

⁸³ GCI, for example, is not the cable provider for ACS's Girdwood wire center. Borland Decl. ¶ 28. Exhibit E attached hereto shows the areas in Anchorage where GCI is certified as a CLEC but that are outside of its cable franchise. In all of those areas, as in Girdwood, GCI does not have cable plant and cannot provide cable telephony.

⁸⁴ Haynes Decl. ¶ 3.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 5.

subscribers that could be affected by a node malfunction, the number of subscribers supported by each node is reduced.⁹⁰ Because right-sizing reduces the number of customers served by each node, GCI must also construct additional nodes in order to be able to serve all of its existing customers.⁹¹

To provide cable television and modem service throughout GCI's service area required approximately [BEGIN CONFIDENTIAL][END CONFIDENTIAL] nodes.⁹² Providing cable telephony throughout GCI's cable franchise area will require approximately [BEGIN CONFIDENTIAL][END CONFIDENTIAL] additional nodes.⁹³ Each node construction requires an initial site survey for the node location.⁹⁴ Before construction can begin, GCI must coordinate with the power company to run a new power supply to the increased number of power insertion points and obtain an easement from the City of Anchorage.⁹⁵ After these steps have been completed, GCI may construct the new node and upgrade power supply locations in order to provide eight hours of battery back-up power.⁹⁶ Existing nodes must also be modified to accommodate the network and backup powering necessary for GCI's cable telephony equipment.⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* ¶ 13. Each node serves approximately [BEGIN CONFIDENTIAL][END CONFIDENTIAL], with the size of the geographic area served varying based on density. *Id.*

⁹⁴ *Id.* ¶ 7.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

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Construction of a single node typically takes six to eight weeks.⁹⁸ GCI constructed [BEGIN CONFIDENTIAL][END CONFIDENTIAL] new nodes in 2004 and [BEGIN CONFIDENTIAL][END CONFIDENTIAL] in 2005.⁹⁹ After node construction is complete, existing amplifiers and taps must be modified to accommodate line-powering.¹⁰⁰

Customer-by-Customer Drop and Equipment Provisioning . Next, GCI must upgrade its customer drops. This requires a drop-by-drop assessment, as drops suitable for providing video programming and cable modem service are not always suitable for carrying line-powered voice service.¹⁰¹ First, to ensure high-quality service, GCI requires that network-powered drops be physically protected up to the point where they arrive at a common utility interface.¹⁰² Because drops used for cable television and modem service are generally not protected in this way, GCI must protect its existing drops before using them for voice service. This is typically achieved by burying the drop, a task which cannot be performed between October and April because of ground freeze in Anchorage.¹⁰³ Second, some drops perform poorly when subjected to the extra voltage

⁹⁸ *Id.* If GCI transitions to customer-powered DLPS, node construction and modification time will be reduced, as some of power upgrades will no longer be required. *Id.* ¶ 8. However, GCI will still have to split and modify nodes and provide battery backup power for the network itself. *Id.* GCI estimates that node modifications to support customer-powered DLPS will require two to three weeks per node. *Id.*

⁹⁹ *Id.* ¶ 13.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* ¶ 9.

¹⁰² *Id.*

¹⁰³ *Id.* ¶ 14.

necessary to deliver voice, and must be replaced.¹⁰⁴ Once all drop issues have been resolved, GCI affixes the terminal unit to the subscriber's unit at the NID, which is typically located on the outside of the premises and so is accessible without inconveniencing the customer.

3. Special Problems of Multiple-Dwelling Units

Approximately [BEGIN CONFIDENTIAL][END CONFIDENTIAL] of GCI's residential lines in Anchorage are located in multiple dwelling units ("MDUs") with greater than 8 lines.¹⁰⁵ In many cases it is not technically or operationally feasible to provide cable telephony service to customers in MDUs.¹⁰⁶ First, drop capacity is limited.¹⁰⁷ Traditional cable television services are provided to MDUs through a single drop line powered by a building amplifier.¹⁰⁸ The network-powered lines GCI uses to provide voice service, however, require additional drops, each of which can power at most two terminal units.¹⁰⁹ Each terminal unit can serve four lines.¹¹⁰ As a result, serving MDUs that contain more than eight units requires additional drops and additional terminal units.¹¹¹ It is not always possible to deploy this equipment, however, as the

¹⁰⁴ *Id.* ¶ 9. If GCI were to move to customer-powered units, the required drop assessment and upgrade work would be reduced. *Id.* ¶ 10. Some, if not all, gains in time would likely be offset, however, by installation difficulties arising from the required indoor installation. For both customer and network-powered units, of course, these are just single steps in the process.

¹⁰⁵ *Id.* ¶ 17.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

telecommunications closets of many MDUs simply do not have the space to accommodate several additional terminal units.¹¹² As a result, GCI often cannot serve customers located in MDUs over its own last-mile facilities.¹¹³

This discussion of obstacles is unavoidably incomplete. GCI began its roll-out of cable telephony less than two years ago, and has focused its efforts and resources thus far on the relatively simpler transition of customers in single-family homes and other non-MDUs.¹¹⁴ As is typical with deployment of any new technology, it is likely that in exploring new solutions for customers in MDUs, GCI will discover additional obstacles that cannot be known in advance of deployment.¹¹⁵

4. Reaching Business Customers

GCI faces significant obstacles in its efforts to serve business customers through cable plant. As an initial matter, GCI's cable plant simply does not pass many business locations.¹¹⁶ Even where GCI's cable plant does pass commercial buildings, few

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* ¶ 18.

¹¹⁵ In an effort to address these challenges, GCI has been working with manufacturers to develop network-powered solutions for MDUs. *Id.* ¶ 19. In fact, GCI recently received a beta version of a 12-line network-powered BTI that could mitigate the MDU operational obstacles described above. *Id.* This new equipment is not scheduled for commercial manufacturing until at least April 2006. *Id.* Commercial deployment will be possible only after manufacturing commences and all technical issues are resolved, a process that typically takes a significant amount of time. *Id.* GCI is also exploring the possibility of addressing powering issues by moving to customer-powered MTA units. As described above in text and footnote to Section III.B.2, however, these units present their own challenges, and it is also not yet clear how best to provision these units in an MDU setting.

¹¹⁶ *Id.* ¶ 20.

businesses subscribe to cable.¹¹⁷ Wiring businesses that do not already subscribe to cable often requires access to conduit space, and obtaining this access in Anchorage has been difficult and time consuming.¹¹⁸ Further, conduit work generally cannot be performed during the winter months in Anchorage.¹¹⁹ As a result, GCI often cannot extend cable plant to business customers within a commercially reasonable time.

5. Using Cable Plant to Serve Enterprise Customers

Even where GCI can reach medium and large businesses with its cable plant, that plant does not support the types of service commonly provided over DS1 or fractional DS1 lines, such as PRI and DSS services.¹²⁰ Nor does cable plant support the high-capacity services GCI provides by combining DS0 loops with its electronics. This is not surprising, as cable standards and cable networks were developed for voice and high speed Internet service for residential and very small business services. While some work-around solutions have been developed, they are cumbersome, expensive, and reduce service reliability.¹²¹ For these reasons, they do not represent a standardized commercially or operationally acceptable alternative to traditional DS1 service.¹²² Instead, in order to provide commercially acceptable retail service to its current DS1 based business customers, GCI requires access to ACS DS1 UNEs.¹²³

¹¹⁷ *Id.* ¶ 21.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶ 22; *see also* Sorenson, at 2 (explaining that providing DS1s over cable plant “poses a serious service deployment challenge” as such services “are not well suited for . . . DOCSIS”).

¹²¹ Haynes Decl. ¶ 22.

¹²² *Id.*

¹²³ *Id.*

C. GCI's Fiber Facilities are Not a Feasible Competitive Alternative for Serving Most Enterprise Locations.

*GCI cannot use its fiber facilities to replace DS1 UNEs for most enterprise customers. As an initial matter, GCI simply does not have fiber throughout Anchorage.*¹²⁴ *Instead, GCI's fiber is concentrated in the Anchorage downtown and midtown areas, which roughly coincide with the ACS North and Central wire centers.*¹²⁵ *Businesses that are not on GCI's fiber cannot, of course, be served by these facilities.*

*In the areas where GCI does have fiber, it is nonetheless not feasible for GCI to serve most enterprise locations using that fiber. The average business customer in Anchorage requires only 6.36 lines, and is consequently not large enough to generate the volume of traffic necessary to justify the customer expense of on premises equipment or the GCI expense of constructing last-mile fiber facilities.*¹²⁶ *Practice in Anchorage confirms this conclusion, as neither GCI nor ACS commonly uses fiber to serve business locations that only require one or two DS1 equivalents. And Mr. Zarakas reaches just this result in his analysis of the economics of extending fiber, determining that it would be uneconomic for GCI to extend fiber to [BEGIN CONFIDENTIAL][END CONFIDENTIAL] customers being served over DS1 UNEs absent demand for at least two DS1s, and even finding that it would be uneconomic to extend fiber facilities to [BEGIN CONFIDENTIAL][END CONFIDENTIAL] locations with as many as 8 DS1s.*¹²⁷

¹²⁴ Declaration of Blaine D. Brown ¶¶ 4-9 ("Brown Decl."), attached hereto as Exhibit J; *see also* Exhibit BB1, attached thereto.

¹²⁵ *Id.* ¶ 5.

¹²⁶ *Id.* ¶ 11.

¹²⁷ *See* Zarakas Decl. ¶¶ 38-44, 48 and Exhibit VIII, attached thereto.

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Even where customers are on GCI's fiber plant and serving them using fiber would be economic, there are additional obstacles that limit the feasibility of extending fiber last-mile facilities in a commercially reasonable period of time. Construction of last-mile fiber facilities is time consuming. In downtown and much of midtown Anchorage, where businesses are most dense and GCI has fiber facilities, extension of last-mile facilities typically requires road bores, permits to shut down streets, and pavement construction and reconstruction.¹²⁸ Acquiring the necessary permits from the City of Anchorage alone takes an average of ten days.¹²⁹ As a result, even during the Anchorage construction season, it is generally not possible to extend new fiber facilities within the [BEGIN CONFIDENTIAL][END CONFIDENTIAL] that Anchorage customers will typically wait for connection of new service.¹³⁰

Where customers may be economically served using fiber, it is very difficult for GCI to gain access to building entrance facilities. For one, it is quite costly to construct new entrance conduit.¹³¹ Putting aside cost, many building owners either do not want or do not have the physical space (or power) to accommodate new building entrance facilities or the electronics necessary to turn fiber into loop plant.¹³²

ACS's proprietary treatment of building access facilities further limits GCI's ability to extend fiber last-mile facilities. ACS has asserted that it is entitled to exclusive

¹²⁸ Brown Decl. ¶¶ 12-13.

¹²⁹ State permitting takes longer – 30 days, on average.

¹³⁰ Borland Decl. ¶ 44.

¹³¹ Brown Decl. ¶ 13.

¹³² *Id.* ¶ 18.

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use of any conduit placed by building owners, and has repeatedly worked to block GCI access to conduit.¹³³ For example,

- At the Peanut Farm, after construction of a new addition and with the approval of the building owner, GCI placed coaxial cable in the new entrance conduit. ACS responded by threatening to remove the cable and refusing to deliver the UNE loop for DSL service. In the face of these actions, GCI removed its cable.
- At a newly constructed building for the Alaska Dance Theater, GCI coordinated with the Building Project Manager and placed its coaxial cable in building entrance conduit. When GCI placed an order for UNE loops with ACS, ACS demanded that GCI remove its cable from the entrance facilities. ACS refused GCI's suggestion that the companies use innerduct and share the entrance conduit. Unwilling to stand in the way of the customer receiving phone service, GCI pulled its cable from the conduit. ACS then intercepted and redirected the conduit, effectively precluding access by GCI or any other competitor.
- At Bailey's Furniture, in the summer of 2005, the building project manager gave GCI permission to use the only entrance conduit to the building. GCI pulled in a temporary copper cable (along with inner duct) to provide dial tone for 3 POTS lines necessary for the certificate of occupancy phones. When GCI arrived on site to pull in fiber, the ACS line crew demanded that GCI stop. GCI did not acquiesce, but attempted to accommodate ACS by leaving the copper in place and offering to give ACS use of the copper or of inner duct. ACS has not yet responded to GCI's proposal.¹³⁴

As these recent examples demonstrate, even as ACS works to deny GCI access to ACS's last-mile facilities by seeking forbearance from unbundling obligations, ACS is taking unreasonable steps that impede GCI's ability to deploy its own last-mile facilities. These artificial obstacles, layered on the many operational and economic barriers already in place, further limit GCI's ability to serve customers using its own last-mile fiber facilities.

¹³³ *Id.* ¶ 19.

¹³⁴ *Id.*

D. GCI is Deploying its Own Facilities as Quickly as Possible.

As discussed above, GCI has compelling reasons to transition its customers to GCI facilities as quickly as possible. There are, unfortunately, a number of operational, economic, and technical reasons why GCI cannot speed up its ongoing transition to cable telephony, even where cable plant is present.

Turning first to operational constraints, any construction project of this magnitude requires substantial advance planning. This process begins with engineering design, a several month process. This is followed by permitting.¹³⁵ During the winter, right of way agencies will not issue the permits required for GCI's upgrade process.¹³⁶ It is also doubtful that GCI could immediately obtain the volume of equipment necessary to perform accelerated upgrades.¹³⁷ Weather also limits the Anchorage construction season to the period from April to October.¹³⁸ Even during the permitting season, it is unlikely that right of way agencies could handle a substantial increase in permit applications without significant delays.¹³⁹ GCI took these various constraints into account when planning and beginning its cable telephony deployment.¹⁴⁰ For these reasons, it would simply not be feasible for GCI to move any more quickly than it already is to construct its

¹³⁵ Haynes Decl. ¶ 6.

¹³⁶ *Id.* ¶ 7.

¹³⁷ For example, some of the upgrade activity requires modification of current plant that must be removed from service, upgraded, and subsequently replaced, complicated the equipment procurement and replacement timeline. *Id.* ¶ 14.

¹³⁸ *Id.*; Brown Decl. ¶ 17.

¹³⁹ While transitioning to customer-powered units could mitigate some of these obstacles, it would not eliminate seasonally-constrained outdoor node and drop. Moreover, installing equipment indoors brings scheduling and customer relations difficulties not present with outdoor provisioning.

¹⁴⁰ Haynes Decl. ¶ 11.

own cable telephony facilities, and significant schedule changes could require 18-24 months to implement.¹⁴¹

Accelerating the transition to GCI facilities would also require significant cash outlays.¹⁴² These resources are further constrained by GCI's parallel efforts to expand its cable telephony service in Fairbanks in Juneau. While it is true that this is only money,¹⁴³ it would simply not be economic for GCI to accelerate its deployment of its own facilities even assuming that operational limits could somehow be overcome. And, acting in an uneconomic fashion would, in the long run, increase GCI's cost of capital and otherwise constrain its ability to fund further deployment of its own facilities. It would be nonsensical for regulatory policy to drive a functioning competitive market to this state, especially where there is every sign that transition to fully self-provisioned facilities-based service is proceeding with all due speed.

Nor is it clear that there are technological solutions that could speed GCI's transition. GCI has, from the start, been on the cutting edge of cable telephony development and has already expended significant resources to drive development of acceptable cable telephony solutions. Despite these efforts, and reflecting in part GCI's place as a relatively small player in the cable industry, cable telephony technology is still maturing. GCI has adopted and continues to adopt the various elements necessary for its

¹⁴¹ *Id.*

¹⁴² Even if it were available, the additional labor, supervision, materials, trucks, and contract engineers necessary to transition all of Anchorage to GCI's cable facilities in short order would exponentially increase the current per-mile cost of deploying GCI's last-mile cable facilities. *Id.* ¶ 14; Brown Decl. ¶ 17.

¹⁴³ ACS Petition at 35; *see also infra* at 36 n.148.

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deployment of cable telephony as quickly as possible. Forcing any faster deployment would unacceptably compromise the quality of GCI's service.¹⁴⁴

ACS's petition also cites several statements made by GCI officers to the RCA and to investors, purportedly establishing that GCI is currently capable of providing voice service to "nearly all" of Anchorage over its own facilities and is delaying deployment only because of the availability of UNEs.¹⁴⁵ In fact, the cited statements prove no such thing. They instead represent straightforward explanations of GCI's basic business strategy to investors and regulators, *viz.* GCI's plan to modify its existing cable plant as quickly as economically and operationally feasible so as to reduce its dependence on ACS-supplied UNEs for residential customers. ACS's petition offers tortured readings of isolated statements to purportedly establish that, *inter alia*, GCI has already completed the conversion process,¹⁴⁶ that the process when completed will affect business and MDU

¹⁴⁴ Dowling Decl. ¶ 12.

¹⁴⁵ ACS Petition at 2, 3, 9, 14, 15, 35. ACS also asserts that the Chair of the RCA has identified Anchorage as a "mature competitive market[]" with emerging facilities based competition. *Id.* at 10 & n.45 (citing Transcript of RCA Public Meeting, Volume I, Presentation of Kate Giard, R-03-03, at 41 (March 30, 2005) ("RCA Meeting Transcript")). In truth, the Chair's reference to mature competition refers only to the level of *retail* competition, a point that is reinforced by the next sentence, which explains that Anchorage, Juneau, and Fairbanks are distinct from the rest of Alaska because "they have [e]merging facilities based competition *and also substantially UNE competition.*" RCA Meeting Transcript at 41 (emphasis added). ACS's Petition paraphrases the "emerging facilities based" language but omits the critical reference to substantial UNE competition – an omission that is emblematic of ACS's general unwillingness to acknowledge the critical importance of UNEs to retail competition in Anchorage.

¹⁴⁶ ACS cites statements made by a GCI executive to the RCA for the proposition that GCI "is capable of providing local exchange and exchange access service over its own facilities by cable, fiber or copper to nearly all of Anchorage." ACS Petition at 2 (citing *Petition of GCI for Arbitration Under Section 252 of the Communications Act of 1996 with the Municipality of Anchorage a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, RCA Docket No. U-96-89, Prefiled Rebuttal Testimony of Dana Tindall on Behalf of GCI, at 5 (filed with the RCA on Sept. 29, 2003) ("Tindall Prefiled Rebuttal Testimony") (attached as Exhibit J to ACS Petition)); *see also*

customers rather than just single home residential customers,¹⁴⁷ or that GCI is not moving as quickly as possible to complete the process because of access to UNEs.¹⁴⁸ In fact,

ACS Petition at 9, 14. But Ms. Tindall merely stated that “GCI is proud that its cable telephony *will* pass 98% of homes in Anchorage.” Tindall Prefiled Rebuttal Testimony at 5 (emphasis added). Most importantly, for all the reasons given above, the fact that cable “passes” a home does not mean that GCI can currently provide voice service to that home. Moreover, the statement addresses only the company’s *future* plans (it uses the term “will” rather than “does”) and it addresses only homes – not businesses or MDUs. In fact, Ms. Tindall went on to emphasize that GCI’s cable plant is not a suitable alternative for serving “many businesses.” *Id.* at 5.

¹⁴⁷ *See id.* In addition, ACS cites GCI’s Q2 2004 Earnings Call Transcript at 4,11 (July 28, 2004) (“Q204 Transcript”) (attached as Exhibit F to ACS Petition) for the proposition that GCI “has announced plans to convert the entirety of its local exchange service customer base to its own facilities, including its cable plant, which passes nearly every residence and business in Anchorage.” ACS Petition at 2 & n.7; *see also id.* at 14. In fact, GCI officers explained to investors only that it is “*positioning*” itself “to deploy digital local phone service using . . . cable plant instead of leased local loops or other means involving the incumbent local exchange provider.” Q204 Transcript at 4 (emphasis added). Viewed in context, this statement does not make any representations about business or MDU customers that cannot at present be served using GCI’s “cable plant.”

¹⁴⁸ ACS asserts that GCI’s Chief Executive Officer has told investors that all the bottlenecks that prevent the immediate transition of current UNE customers to GCI’s own facilities “can be cured by money.” ACS Petition at 35 (citing Q204 Transcript at 11); *see also* ACS Petition at 8, 15. There is no indication the speaker is addressing anything other than the residential market. Moreover, the emphasis is on the “probably . . . 25 bottlenecks that kick in at various levels” to impede the conversion process and the fact that speeding up the process unduly would render it uneconomic. Q204 Transcript at 11. Plainly, consumers – who will ultimately pay the costs of investment through higher prices – are best served if GCI continues to convert its facilities at a rate that does not require reckless and/or wasteful spending.

ACS also cites two statements by GCI Senior Vice President Dana Tindall for the proposition that “the rate at which GCI transitions its UNE loops to its own cable telephony network is entirely dependent upon the cost of leasing ACS’s UNEs.” ACS Petition at 8 (citing *Petition of GCI for Arbitration Under Section 252 of the Communications Act of 1996 with the Municipality of Anchorage a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, RCA Docket No. U-96-89, Testimony of Dana Tindall on Behalf of GCI, Before the Regulatory Commission of Alaska, Public Hearing, Volume X at 850 (Nov. 6, 2003), (“Tindall Nov. 6, 2003 Testimony”)); ACS Petition at 3, 42 (citing Tindall Prefiled Rebuttal Testimony at 3). In fact, in both instances, Ms. Tindall simply made the unremarkable concession that the UNE rate is one among many factors that GCI must consider, as a matter of basic economics, in assessing the opportunity costs of building its

none of these claims accurately portrays the current or future state of GCI's business.

Rather, as demonstrated in the footnotes below, in each of the cited statements, GCI has been careful to give regulators and investors a complete and accurate picture of the progress that GCI has made to date, the scope of that progress, and the fact that the conversion process is a complicated and costly one that will take a significant period of time to complete.¹⁴⁹

own last-mile facilities – and thus that an extreme increase or decrease in the UNE price might, in theory, change the economic logic of building facilities. See Tindall Prefiled Rebuttal Testimony at 3 (noting that “[r]aising UNE rates *dramatically* would compel GCI to speed up”) (emphasis added); Tindall Nov. 6, 2003 Testimony at 850-851 (responding to the suggestion of cutting the UNE rate *in half*: “I’m not saying what we would do, but if it gets down to the rate where I believe a TELRIC rate makes a competitive entrance somewhat indifferent between building versus leasing we would have to look at it.”). But Ms. Tindall nowhere suggested that the UNE rate is the only – or even the most important – factor in GCI’s build/lease decision. In fact, Ms. Tindall went on to emphasize that even in the face of a 50 percent reduction in the UNE rate, “I do believe we would still build out our cable telephony plan[t] because we have a lot of non-price reasons for building a cable telephony plant Our non-price reasons are for ACS to no longer have control over our customer base by their network and for business certainty.” Tindall Nov. 6, 2003 Testimony at 851. Ms. Tindall also emphasized that operational factors, and not UNE rates, play a critical role in determining how fast GCI can convert its customers to its own facilities, and that “even when fully deployed, [GCI’s cable last-mile facilities] will not be ubiquitous.” Tindall Prefiled Rebuttal Testimony at 3.

Finally, ACS implausibly asserts that GCI accelerated its transition from UNEs in 2004 *substantially in response to the RCA’s increase of UNE loop rates*. ACS Petition at 3. In fact, as ACS’s own expert concedes, “GCI hastened its own facilities deployment . . . two months *before* the RCA increased the loop rate that ACS could charge.” ACS Petition, Statement of David C. Blessing in Support of ACS, at 15, attached to ACS Petition as Exhibit E (“Blessing Stmt.”). In any event, ACS has not begun to show any causation between the two events, nor does it address the significant non-price and regulatory certainty considerations that tip the balance towards building rather than leasing. More generally, ACS’s expert has no answer to the many non-price reasons discussed above for GCI to build its own facilities.

¹⁴⁹ See, e.g., Q204 Transcript at 11 (“There are a lot of interoperable plant and customer issues associated with the [conversion of UNE customers to DLPS]. We’re going through a process of trying to identify and mitigate bottlenecks that occur at certain deployment levels.”); Tindall Prefiled Rebuttal Testimony at 5 (“While GCI is proud that its cable telephony will pass 98% of the homes in Anchorage, there are still many

E. Commercial Negotiations Will Not Result in Non-Monopolistic Rates for UNEs.

ACS suggests that non-monopolistic rates for Anchorage UNE loops can emerge from commercial negotiations, citing both GCI's exclusive control over some last-mile facilities in Anchorage and successful commercial negotiations between ACS and GCI in Fairbanks and Juneau.¹⁵⁰ Neither of these points, however, supports a conclusion that commercial negotiations unconstrained by regulatory requirements will result in non-monopolistic rates for UNEs in Anchorage.¹⁵¹

First, GCI controls only a very small proportion of the last-mile facilities in Anchorage. While ACS currently provides last-mile access to more than 152,000 of the roughly 180,000 switched lines in service in Anchorage, GCI currently provides exclusive last-mile access to [BEGIN CONFIDENTIAL][END CONFIDENTIAL] customers on Elmendorf Air Force Base and [BEGIN CONFIDENTIAL][END CONFIDENTIAL] commercial office buildings.¹⁵² While relatively proportional control of last-mile facilities might create incentives for ACS to negotiate reasonable rates and terms for GCI's use of ACS's facilities, there is no such proportional control

business customers whom we will not be able to serve over our cable telephony network.”).

¹⁵⁰ ACS Petition at 13-14.

¹⁵¹ See generally Sappington Decl. ¶¶ 87-96.

¹⁵² Exhibit I, attached to Zarakas Decl.; Brown Decl. ¶ 20.

here.¹⁵³ Access to GCI's last-mile facilities accordingly will not drive ACS to offer GCI *just and reasonable rates for access to ACS's last-mile facilities.*¹⁵⁴

Indeed, when ACS asserts that "[t]he only Anchorage customers that are denied a choice are those that are being served exclusively by GCI's facilities,"¹⁵⁵ it actually illustrates the opposite of what it intends. As noted above, there are virtually no Anchorage customers served only by GCI's facilities. But if ACS receives the unbundling relief it seeks, an enormous number of Anchorage customers will be "denied a choice" of providers – only ACS will be able to serve them over its own facilities. And as ACS correctly recognizes, these customers can expect to lose "the benefit of competition . . . that most Anchorage customers" have received because they currently "have a choice of facilities-based providers."¹⁵⁶

Nor does the history of negotiations in Fairbanks and Juneau indicate that ACS will negotiate just and reasonable rates in Anchorage in the absence of regulatory

¹⁵³ Sappington Decl. ¶ 95.

¹⁵⁴ ACS also incorrectly asserts that GCI has "vehemently opposed" ACS's request for loop reciprocity during RCA interconnection agreement proceeding. ACS Petition at 14 n.66 (citing *Petition of GCI for Arbitration Under Section 252 of the Communications Act of 1996 with the Municipality of Anchorage a/k/a ATU Telecommunications for the Purpose of Instituting Local Exchange Competition*, RCA Docket No. U-96-89, GCI Brief, Reciprocity: The Obligations Set Forth in Section 251(c)(3) Do Not Apply To GCI (filed May 13, 2003) ("GCI Section 251(c)(3) Brief"), reproduced at Exhibit K to ACS's Petition). In fact, in the pleading in question, GCI merely pointed out that Section 251 of the Communications Act applies only to ILECs and not CLECs – GCI's assertion of an entirely valid legal argument is hardly the malfeasance or anti-competitive "vehemence" that ACS seems to believe. At any rate, GCI has also made clear to the RCA that it is voluntarily committed to "tak[ing] all comers at the wholesale level on [its] cable plant" at TELRIC prices. Tindall Nov. 6, 2003 Testimony at 885; *see generally* Brown Decl. ¶¶ 20-21. Thus, there is simply no merit to ACS's claim that GCI refuses to offer ACS or other competitors access to its last-mile facilities.

¹⁵⁵ ACS Petition at 14, 27.

¹⁵⁶ ACS Petition at 14.

safeguards. In fact, quite to the contrary, the history of those negotiations demonstrates that ACS is *unlikely to negotiate just and reasonable rates* in the absence of external constraints.

ACS voluntarily negotiated UNE loop rates in Juneau and Fairbanks only after it made contradictory and very public representations about its financial well-being. Specifically, in response to GCI's petition to the RCA to terminate the rural exemptions for ACS's Juneau and Fairbanks affiliates, ACS repeatedly asserted that without the rural exemption – specifically, exemption from their continuing obligations to provide GCI with access to unbundled loops – ACS Fairbanks, ACS Juneau, and ACS as a whole would face serious financial difficulties.¹⁵⁷

At roughly the same time, ACS's parent holding company filed with the SEC a draft prospectus for an Income Deposit Securities ("IDS") offering.¹⁵⁸ IDS offerings involve the sale equity and debt securities for investors looking for a current return in the form of interest payments and common stock dividends.¹⁵⁹ Therefore, only companies with a strong, stable cash flow can make a successful IDS offering.¹⁶⁰ Companies with volatile or declining cash flows are poor candidates for IDS offerings.¹⁶¹ At no time in

¹⁵⁷ See, e.g., Prefiled Opposition Testimony of Kenneth L. Sprain, RCA Docket Nos. U-97-082, U-97-143, at 4 (filed March 26, 2004) ("With the diminishing market shares and associated financial impacts, the Rural Companies have been forced to a point where they have already restricted our capital and maintenance expenditures to levels that provide only basic service and availability. These spending restrictions negatively affect many aspects of the companies' business, including capital spending, maintenance levels, and customer service."); see also Tindall Decl. ¶ 20.

¹⁵⁸ Brown Decl. ¶ 21.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

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that prospectus did ACS's parent acknowledge or disclose that it faced a material risk of *impaired cash flow in the event that its Fairbanks and Juneau subsidiaries were required to continue to provide UNE loops to GCI.*¹⁶²

GCI raised this disparity before the RCA by filing expert testimony explaining that the IDS offering conflicted sharply with ACS's statements that its near-term financial danger required RCA's reinstatement of ACS's rural exemption in Fairbanks and Juneau.¹⁶³ Only after this expert testimony exposed the disparity between ACS's claims before the RCA and its IDS offering, and shortly in advance of a hearing at which ACS financial officers were likely to testify and be subject to cross-examination by GCI and the Regulatory Commission of Alaska, were ACS and GCI able to successfully negotiate availability and rates for UNE loops in Fairbanks and Juneau.¹⁶⁴ There is no similar incentive for ACS to negotiate in Anchorage today, and therefore no reason to infer that ACS will voluntarily reach reasonable terms and conditions in the absence of regulatory constraints. In fact, GCI asked ACS to negotiate UNE rates for Anchorage at the same time the parties negotiated UNE rates for Fairbanks and Juneau.¹⁶⁵ Despite the prospect of a lengthy and highly contested arbitration proceeding, ACS rejected that proposal and has since shown no interest in voluntary negotiation of Anchorage UNE rates with GCI.¹⁶⁶

¹⁶² *Id.*

¹⁶³ *Id.* ¶ 22.

¹⁶⁴ *Id.* ¶ 23.

¹⁶⁵ *Id.* ¶ 24.

¹⁶⁶ *Id.* ACS also claims that GCI has "acknowledged" that ILECs would be motivated to enter into negotiations for UNEs voluntarily. ACS Petition at 34 (citing *In the Matter of Commission Review of Rules and Regulations Governing Telecommunications Rates, Charges Between Competing Telecommunications Companies and Competition in*

F. Failure to Require ACS to Unbundle Loops and TELRIC Rates Will Allow ACS to Raise Rivals' Costs and Exercise Market Power

As demonstrated above, GCI must have access to unbundled loops in order to continue to serve most Anchorage homes and businesses. The forbearance ACS seeks would empower it to refuse to lease these loops to GCI, or to charge GCI supra-competitive prices for them. In short, it would give ACS nearly absolute control over the last-mile connections that are essential to the continuing vitality of GCI, its principal competitor. As the Commission recently explained in the *TRRO*:

In the absence of UNEs, incumbent LECs would . . . have the ability to set the price of their direct competitors' critical wholesale inputs (e.g., tariffed end-user channel termination . . .).

...

Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market.¹⁶⁷

Economists and the courts have also long recognized that allowing a dominant provider to control such facilities is a recipe for higher prices, lower quality, and reduced consumer choice.¹⁶⁸ And in time, it would force the RCA (and possibly this

Telecommunications, GCI Reply Comments, RCA Docket No. R-03-03, at 7 (filed May 19, 2005)). In fact, GCI made no prediction about how an ILEC in ACS's shoes would act, but simply observed that if a rural ILEC's financial health were genuinely threatened by full facilities-based competition, then the rural ILEC could continue to gain some revenue from each line by leasing its loops at competitive prices. *Cf. Omaha Forbearance Order* ¶ 81. But that is a far cry from the situation here, where GCI does not have the stick of full-facilities based competition with which to force ACS to offer its loops at economically reasonable and competitive prices.

¹⁶⁷ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, FCC Docket No. 01-338 (¶¶ 59, 63) (released February 4, 2005) ("*TRRO*").

¹⁶⁸ See generally Sappington Decl. ¶¶ 11-23, 113-122.

Commission) to return to regulating retail rates and terms in Anchorage. These are precisely the outcomes that Congress intended the 1996 Act to prevent.

ACS's petition conspicuously fails to address the fact that it is asking for pricing deregulation of a bottleneck facility.¹⁶⁹ Instead, ACS spends the bulk of its petition making an argument that boils down to "things are working well right now."¹⁷⁰ This demonstration is entirely beside the point. As a logical matter, the existence of adequate retail competition in a market with unbundling does not imply that retail competition will continue to be adequate if the Commission were to eliminate unbundling. Even more important – and as the Commission recognized in its recent *Omaha Forbearance Order* – ACS gets it exactly backwards to suggest that retail competition that exists largely because of unbundling somehow justifies getting rid of unbundling.¹⁷¹ Rather, the greater the reliance of current retail competition on unbundled loops, the greater the need to continue to require unbundling.¹⁷²

What ACS's petition fails to acknowledge, in other words, is that the relevant analysis must be *forward-looking*. The proper question is: What will happen to retail competition in Anchorage if ACS is suddenly free to cease offering UNE loops or to cease offering them at regulated rates? Presumably, ACS does not engage in this inquiry because the only reasonable conclusion – that forbearance will reduce competition and

¹⁶⁹ See *Id.* ¶¶ 81-86, 97-102.

¹⁷⁰ ACS Petition at 4-17.

¹⁷¹ *Omaha Forbearance Order* ¶ 110 ("In the Omaha MSA, where retail competition often is based on the use of Qwest's facilities, eliminating the requirement to provide wholesale access to Qwest's loops . . . is likely to result in a reduction of the very competition Qwest relies on to justify granting its Petition [for forbearance from, *inter alia*, loop unbundling].").

¹⁷² See *id.* ¶¶ 61-83.